

Slovenian Constitutional Hardball

Samo Bardutzky

2021-04-01T10:25:01

In the past few months, Slovenia has attracted a level of attention in Europe that is unusual for one of the Union's smallest Member States. One reason is the prolific tweeting of the country's Prime Minister (PM). A negative example are his accusations of lies against a journalist of the Brussels edition of Politico, which triggered a [nervous response from the European Commission](#). In addition, there is a lot of speculation whether Slovenia [might be the third Member State to join Hungary and Poland](#) in their specific view of European values, and particularly the rule of law. The alignment on a number of ideological questions – populism, nativism and traditionalism – is met by financial connections. The circles close to Fidesz have just [invested considerably](#) into the media controlled by the senior coalition partner, and Fidesz's ally in the Slovenian government, SDS.

Ideological as well as financial bonds between the Slovenian and Hungarian governments lend weight to a concern: Does the current Slovenian government present a threat to constitutional democracy? Lacking a convincing majority in the Parliament and facing other veto points, the Slovenian government uses tactics of constitutional hardball in order to disrupt the existing norms of the constitutional order.

You can't always get what you want...

In [2018, Kim Lane Scheppele](#), with Viktor Orban as the central case study, described a new kind of prospective autocrats, 'autocratic legalists'. They use "democratic legitimacy to launch legal reforms to remove the checks on executive power, limit the challenges to their rule, and undermine the crucial accountability institutions of a democratic state". They can "hide their autocratic designs in the pluralism of legitimate legal forms." Is this on the horizon in Slovenia?

The prerequisite for legal reforms that will make it easier to rule and, in the next step, entrench the rulers' power, is electoral success, commonly on the wings of widespread discontent in society. In Orban's words on the eve of the election that brought Fidesz a constitutional majority in the Hungarian Parliament: [We have only to win once, but then properly](#). In contrast, the Slovenian proportional electoral system has so far prevented single parties from forming a government without a coalition. SDS, the PM's party, has to rule with the support of two coalition partners. Within its coalition government, and despite its rather shaky, yet still workable majority in the National Assembly, it is obvious that SDS has difficulties pursuing its agenda.

Thus far, the current Slovenian Government has not managed to push through a single considerable legislative reform. Instead, it has repeatedly attempted to sneak individual problematic solutions into the so-called 'anti-corona packages' (described [here](#)). The lack of control over Parliament is perhaps most visible when it comes to appointing judges to the Constitutional Court: [the President of the Republic was assured by the coalition parties that his candidate would get support, yet in a secret ballot, the votes were simply not there.](#)

This is not irrelevant. The Constitutional Court might not have been able to keep tabs on the government's anti-pandemic restrictions, largely due to its excessive backlog of cases. However, in 2021 the Court adopted *interim* measures to suspend two controversial legislative solutions: The [extension of valid accreditations of higher education institutions](#) (HEI) and the easier firing of workers that have reached retirement age (the latter also mentioned [here](#)). The Court is thus already seen and treated as an unwanted obstacle.

...but if you try sometimes, you get what you need

What can would-be autocrats do, when they find themselves at the helm of a democratic country, yet lack a convincing majority in Parliament, as well as face other veto points?

In Slovenia, the answer is: *they disrupt*.

Some of the disruptive tactics are what [Mark Tushnet described as constitutional hardball](#): The exploitation of procedures, laws and institutions by political actors for partisan gain in ways which violate pre-established norms and push the bounds of legality. Five examples are particularly noteworthy:

1. The Slovenian government has refused, for several months, to vote on the Justice Minister's proposal to appoint new national state prosecutors, as well as refused to acknowledge the proposal of the Slovenian Council of State Prosecution (CSP) for the appointment of delegated European public prosecutors from Slovenia. The Justice Minister has publicly stated that she is not aware of the reason why these items are not included on the Government's agenda. This was one factor that led the National Association of State Prosecutors to complain to the CoE about ["inadmissible pressures"](#) on the prosecutors, and led Commissioner Reynders to urge Slovenia not to delay the functioning of the [European Public Prosecutor's Office](#). While rare in the past, it is within the Government's power to refuse the Minister's nominees. However, an outright refusal would likely cause coalition tensions. Instead, the Government prefers to do nothing. As for the delegated European prosecutors, the legislation instructs the Government to merely acknowledge the CSP's proposal before sending it to Brussels. By choosing not to table this item on its agenda, the Government leaves the European institutions (as well as the two Slovenian candidates) waiting.

2. For a week in February, the Government [stalled the approval](#) of nation-wide calls for applications to study at all public HEI. There is a lengthy process of coordination between the HEI and the Ministry of Education, throughout which admission quotas are determined for all publicly-financed, tuition-free programmes. It had been common practice for the Government to confirm the call without a long procedure. After all, the executive branch already participates in the process of coordination and the deadlines are tight, to fit into the academic year. However, in Spring 2021 the PM tweeted that the Government's delay of the call was "[a consideration of strategic nature](#)" to take into account "the HR needs of the public sector, the economy and the state as a whole". This is not very convincing. The Rector of the University of Ljubljana called the move a "[blockade of enrolment in the next academic year, which threatened a whole generation of youth](#)". The U-turn came less than a week later, with the [Government approving the call](#), but not before minor changes were hastily made to the admission quotas for future physicians and IT-experts. No real damage was done, with the exception of shot nerves of this year's high school seniors, who, in addition to enduring months of learning online, held their breath for a week. Was this a win for the Government? *Prima facie*, probably not. But the message regarding the Government's power to disrupt the academic process was heard loud and clear across the Slovenian public HEI.
3. The tensions between some Slovenian media and the Slovenian government drew attention across Europe, for example in this [February 2021 Politico article](#). One focal point is the position and financing of the Slovenian Press Agency (STA). STA is incorporated as a limited liability company, with the Republic of Slovenia as its only shareholder. It is regulated by a [parliamentary statute](#) to strengthen its independence and public service outlook. The prelude to the conflict seems to have been an incident in October 2020, when the PM called STA "[a national disgrace, unworthy of the name it bears](#)". Shortly after, the Government Office of Communications (UKOM) refused to authorise outstanding payments to STA for its public service functions, demanding that STA first hand over documentation related to its market activity. STA refused. Per STA's Director, UKOM had [demanded detailed information](#) on the work of journalists, infringing upon STA's editorial autonomy. There was considerable outcry, resulting in an *ad hoc* alliance of opposition parties and junior coalition partners that legislatively reaffirmed the state's obligation to finance STA's public service. The Government expressed doubts as to the compliance with EU state aid rules and [has to date not executed all payments](#). The Speaker of the National Assembly flipantly remarked that the STA [will just have to enforce its payment in court](#). But securing a final judgment will take a while, and in the meantime, STA will likely have to reduce its activity. Weaker performance will provide a perfect excuse to reform, restructure or replace it. Meanwhile, the PM has [called](#) on STA's Director (the CEO of a limited liability company!) to resign.
4. Without sufficient support in the Parliament to "[capture the referees](#)", the Government decided to discredit the legitimacy of many independent rule of law institutions. The Constitutional Court, a powerful and respected judicial body, has recently come under strong attacks both by the Government and some legal academics over alleged violations of professional standards. This was decried publicly, in an unusual move for otherwise reserved members of the

Court, by two of its judges ([here](#) and [here](#)). Further, right before the publication of the Court of Auditors' (CoA) report on irregularities in the Government's public procurement of medical and protective equipment at the beginning of the pandemic, a "scandal" was revealed related to an alleged conflict of interest of the President of the CoA. [This culminated in a parliamentary committee calling for the CoA President to resign](#), which he has rejected.

5. Instead of genuinely trying to reform the alleged captured state, the Government continued with the practice of clientelism and politicization in key public institutions, which, [they claim](#), was also not uncommon among their left-liberal predecessors. Without having regard to the meritocracy and avoidance of conflict of interests, it nominated fellow party members and friends to run several state companies, agencies and ministries. Key law enforcement agencies have been [particularly targeted](#). Likewise, all key positions in the police, and its investigative force, the National Investigation Office (NPU), are now in the hands of SDS.

The puzzling nature of the game

Such disruption cannot be considered illegitimate *a priori*. In exceptional cases, for example periods of political transition, disruption is a legitimate method to tackle the pre-existing, entrenched societal, political and economic extractive forces. In SDS's narrative, leftist and liberal-centrist elites currently perpetuate such unbearable dominance in all societal domains, except the current political setup.

However, in at least three respects, SDS's disruptive approach cannot pass the test of reality. First, it falls prey to the political projection bias, where incumbent political forces exaggerate negative views about their predecessors and adversaries ("shifting the blame"). With the goal of lowering standards of political responsibility, they also try to minimize their own political capacity for a societal change ("tied hands"), which is substituted by self-proclaimed virtue, moral soundness, resilience and tenacity. Second, demonising the opposition and economic elites solely for their alleged accumulated societal dominance cannot justify present and future abuse. Third, playing constitutional hardball implies stretching the ordinary narrative of the rule of law compliance to its limits. As shown, SDS's disruption easily transgresses the boundaries of this liberal value. Therefore, incumbent political forces act no different than, they allege, their predecessors and leftist or liberal elites.

What is the purpose of the described disruptions? Constitutional hardball, so Tushnet, is usually a rational strategy. It can serve politicians as a strategy to either *take over* power or *preserve* existing positions of power. The incumbent Slovenian government, installed approximately a year ago and facing parliamentary elections in another a year, seems to be preparing itself both for a potential electoral victory as well as a defeat. In the latter case, the next government might have to work with institutions that have undergone two years of disruption. In the former case, the disruptions will have helped discredit and debilitate some of the independent institutions, perceived as capable of impeding future entrenchment of power. Additionally, a change in the institutional leadership or its rules will be easier if the institution is perceived as inefficient or corrupt. A further consequence might be that

disruptions elicit more “cooperative” behaviour from those societal actors that might raise their voices, but could stay silent for fear of even stronger disruption: academia, media, civil society and the courts. If that is to be the case, the disruptive prelude will be over; the chapter on autocratic legalism will be able to properly begin.

